

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 UNITED STATES OF AMERICA,)

4 Plaintiff,)

5 v.)

6 PIROUZ SEDAGHATY, et al.,)

7 Defendants.)

) No. 05-60008-2-HO

) February 16, 2010

) Eugene, Oregon

8
9 TRANSCRIPT OF ORAL ARGUMENT

10 BEFORE THE HONORABLE MICHAEL R. HOGAN

11 UNITED STATES DISTRICT COURT JUDGE

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1 (Tuesday, February 16, 2010; 11:54 a.m.)

2 P R O C E E D I N G S

3 THE CLERK: Now is the time set for the matter
4 of *United States of America versus Pirouz Sedaghaty*,
5 Case No. 05-60008, time set for oral argument on motion
6 247 to compel, motion 251 to compel, and motion 253 to
7 compel.

8 Mr. Cardani, at counsel table you have
9 Mr. Gorder with you and also you have Ms. Anderson; is
10 that correct?

11 MR. CARDANI: Yes.

12 THE CLERK: Thank you.

13 And, Mr. Bons, you are appearing on behalf of
14 the bank?

15 MR. BONS: I am, Your Honor.

16 THE CLERK: And I have Bruce (sic) Green at
17 counsel table with you, as well as -- may I have your
18 name?

19 MS. HAVEL: Mia Havel, M-I-A, H-A-V-E-L.

20 MR. BONS: I just want to make sure I didn't
21 misunderstand you, Boaz Green for the bank also, Boaz.

22 THE CLERK: Yes.

23 THE COURT: Mr. Wax, we'll take your motion
24 first. Let me just -- of course I'm familiar with the
25 subject matter from the previous motion and so on. And

1 the fact is, of course, that there is no Mutual Legal
2 Assistance Treaty with Saudi Arabia, so that's kind of a
3 moot question. And I'm considering a limited issuance
4 of letters rogatory, but not one that will impact the
5 trial schedule, just so that you know. So at least you
6 know what to dissuade me of, if you can use a rifle
7 instead of a shotgun. All right. If you have some more
8 about this, great.

9 MR. WAX: On Friday we filed a motion for
10 reconsideration of the Egyptian request. And this
11 morning we were able to obtain a declaration from the
12 Attorney Boss who was the attorney in the El Hindi
13 matter. That should have been filed electronically
14 around 8:00 or 8:30 this morning. I think that informs
15 that portion of your decision in the Egyptian matter and
16 should inform your decision in the Saudi matter with
17 respect to the dispute that apparently exists between
18 the United States and Mr. Sedaghaty about the
19 utilization of the MLAT procedure by the government for
20 defense counsel in other cases.

21 When we argued previously, the government had
22 represented to the court that they did not believe that
23 it had occurred. In your opinion you indicated in a
24 footnote that you did not believe that it had been
25 utilized. Mr. Boss's declaration, as we see it, makes

1 clear that the government did proceed with the MLAT.
2 And the absence of any evidence in that case was the
3 result of the receiving country's failure to respond
4 rather than the United States government's unwillingness
5 to utilize the process.

6 On Friday, we also sent the government a letter
7 and attachments that included a number of other
8 documents that we're interested in obtaining from Saudi
9 Arabia. We suggested to them that it might make more
10 sense to deal with the Saudi documents with a
11 conversation between us first.

12 We certainly would be happy for the court, if
13 you are inclined, to issue the letter rogatory with
14 respect to the documents we had identified or with
15 respect to our request for the interview of Sami
16 Al-Sanad. I do want to make you aware that there are
17 other documents, we hope to have a discussion with the
18 government about them.

19 We also have been looking at the procedures in
20 18 U.S.C. 3491 et seq., which call for utilization of
21 U.S. consular officials in order to deal with the
22 authentication aspects of documents. So that's what we
23 have to say about those issues today.

24 THE COURT: Yes.

25 MR. GORDER: Your Honor, Charles Gorder for the

1 United States. First, turning to the matter involving
2 your previous order regarding Egypt. As you know,
3 Mr. Wax's filing was late Friday afternoon, and over the
4 three-day weekend, we have not had a chance to confirm
5 or find out exactly what the facts are with regard to
6 this question of whether an MLAT was ever sent to Egypt
7 in the El Hindi case.

8 The people we have talked to this morning don't
9 believe that there was, but there is one person that we
10 were unable -- or they were unable to find before we
11 came to court. And so what we would ask is the time to
12 properly respond to that issue.

13 With regard to the defendant's motion for a
14 letter rogatory to Saudi Arabia, I don't want to repeat
15 everything that is in our briefing, but we do not
16 believe that there is a sufficient basis to have a
17 letter rogatory for any of the four documents that
18 Mr. Wax proffered in his motion.

19 We really question both the relevance and, to
20 some extent, the authenticity of several of those
21 documents.

22 THE COURT: I may agree with that, but here is,
23 I think, the way to do this is for Mr. Wax to send us
24 both what he would like the letter to say, let him do
25 the drafting, in other words, while we deal with the

1 bank robber cases and so on; then you respond on a form
2 you think is appropriate. I'd just like it to happen
3 quickly, because we do have a June trial date here. And
4 I have my jaw pretty much set on that. Okay?

5 MR. GORDER: Okay. With regard to Mr. Sanad,
6 as we indicated, we don't have any objection to an
7 invitation for him to come testify, but we think that
8 just the limited letter rogatory, at best, would be
9 sufficient to find out if he's willing to provide any
10 kind of statement.

11 And as the court -- you are familiar, I assume,
12 with the briefing in the matter involving the bank, I
13 seriously doubt we'll get a response.

14 THE COURT: In 37 years, one I haven't had yet
15 so it's always nice to get something new.

16 And how much time do you want to respond on the
17 previous order on the matter that Mr. Wax talked about?

18 MR. GORDER: A week, Your Honor, would be fine.

19 THE COURT: That's fine. Okay. Well, great.
20 So why don't you submit a form of letter rogatory that
21 you'd like me to sign.

22 MR. WAX: I believe that we had done that, Your
23 Honor, as an attachment to the motion.

24 THE COURT: If you did, I didn't read it. But
25 if we have it, great.

1 MR. WAX: I will double check that, but I
2 believe that we included as Exhibit A to the pleading
3 the actual letter rogatory itself in the form that we
4 understood would be appropriate.

5 THE COURT: All right. So I'd like your
6 response in a week on that also.

7 MR. GORDER: Very well.

8 THE COURT: Let's go to the bank matter.

9 MR. WAX: Your Honor, when you are done with
10 the bank, there are a couple of other brief issues that
11 I hope we can return to.

12 MR. GORDER: Your Honor, Charles Gorder again
13 for the United States. Since we filed our reply brief
14 last week, we learned that Judge Huvelle in the District
15 of Columbia has granted the government's motion to stay
16 the proceeding that the bank filed in the District of
17 Columbia. That actually occurred last Tuesday. Because
18 of the snow issues in D.C., we didn't find out about it
19 until Friday afternoon.

20 THE COURT: I received the language on that.
21 It was a clean punt.

22 MR. GORDER: Right, the ball is in your court.

23 THE COURT: I understand, I understand exactly
24 what she did. They have a great lunch room there for
25 the judges, by the way. And I'll point it out to her

1 next time I'm there.

2 MR. GORDER: Thank you, Your Honor. Your
3 Honor, this is a matter of first impression, so I would
4 like to spend a little time talking about the history of
5 5318(k) of Title 31. It was added as part of Title III
6 of the PATRIOT Act that was passed shortly after 9/11.
7 And Congress was very specific in its findings and its
8 purpose in passing this statute. It specifically found
9 in Section 302 of the PATRIOT Act -- and I'm
10 paraphrasing -- that jurisdictions outside the United
11 States provide essential tools to disguise the
12 ownership, movement of criminal funds used to commit,
13 among other things, terrorism. And that correspondent
14 banking facilities are susceptible to the manipulation
15 that would permit the laundering of those kinds of
16 funds.

17 And the purpose of the actual title was to
18 increase the strength of U.S. measures to prevent,
19 detect, and, I emphasize, prosecute the financing of
20 terrorism. So we submit the Congress knew exactly what
21 it was doing when it passed this statute.

22 It set up a regime where the Department of
23 Justice could issue an administrative subpoena, and
24 require all banks that have a U.S. presence through the
25 correspondent banks to have a registered agent in the

1 United States to accept service of the subpoena. And it
2 expected that bank -- foreign banks would be in the
3 dilemma that Al Rajhi claims that they are in today when
4 it passed this statute.

5 Let me give you just also a little background
6 concerning the government's attempts to not use this
7 process. This is the kind of process that we only use
8 when we do not receive the kinds of cooperation in law
9 enforcement matters that we would expect from our
10 international partners and nations.

11 In July of 2008, the government made, through
12 the Department of Justice, a formal request to the
13 Kingdom of Saudi Arabia for exactly what we're asking
14 for in this administrative subpoena. It was grounded in
15 the U.N. convention, International Convention for the
16 Suppression of the Financing of Terrorism and also the
17 principle of reciprocity, which is obligatory on nations
18 in the world.

19 And in our judgment and in the judgment of the
20 people at the Department of Justice who do this for a
21 living, because it was obligatory on the Kingdom of
22 Saudi Arabia, we had a much better chance of getting
23 these records rather than going through the letter
24 rogatory process, which is totally discretionary on the
25 court that ultimately receives the letter rogatory.

1 That formal request was presented to the
2 Kingdom in September of 2008 by the Department of State.
3 And we have received absolutely no response, which is
4 why the Justice Department authorized the U.S. Attorney
5 in the District of Oregon to issue this subpoena last
6 summer in July of 2009.

7 So the record should be clear that this was not
8 a casual decision on the part of either Mr. Cardani or
9 myself. That this was -- we tried what we thought were
10 the best alternatives to what we call a noncooperative
11 option in a case like this. And we were just simply
12 unsuccessful.

13 The bank has four arguments to resist
14 enforcement of this subpoena. I'd like to address, I
15 think, in the order of seriousness of their arguments,
16 and it seems to me, at least, that their most serious
17 argument is that they are in this dilemma of being
18 forced to either violate U.S. law or violate Saudi law.

19 The real dilemma that they find themselves in
20 is to effectively lobby their government to comply with
21 its international obligations or risk losing its
22 corresponding bank privileges in the United States. And
23 the bank's own exhibits, I think, show you that the
24 conundrum of violating Saudi law or violating U.S. law
25 is a false dichotomy.

1 In Exhibit C in their motion that they filed in
2 D.C., which is incorporated by reference in their
3 response in this court, they set out Section 2.63 of the
4 Saudi anti money laundering rules, which specifically
5 provide for exceptions in cases like this. And I quote,
6 in accordance with Articles 22 and 23 of the Saudi anti
7 money laundering law which allow cooperating with
8 international governmental authorities for cases
9 involving money laundering and terrorist financing, any
10 sharing of information with a foreign party whether with
11 another bank or a foreign governmental authority should
12 not be done without the prior approval and coordination
13 with the Saudi Monetary Agency.

14 And Article 22 of their money laundering
15 statute says an exception to the confidentiality
16 provisions that normally apply -- as an exception,
17 excuse me, disclosed information by financial
18 institutions could be shared with concerned foreign
19 authorities that are connected with the Kingdom through
20 valid agreements or conventions or on the basis of
21 reciprocity according to defined legal procedures.

22 Now, the bank, at least in their papers today,
23 have shown that they made no effort to talk to the Saudi
24 Monetary Authority about those international obligations
25 and asking for an exception. So we question, really,

1 whether the bank actually faces the dilemma that they
2 pose.

3 But the case law, Your Honor, is clear. Even
4 if there is such a dilemma, the United States' interests
5 in enforcing its own laws outweighs foreign bank secrecy
6 law.

7 The leading case in this area throughout the
8 country is the Eleventh Circuit's decision in the *Bank*
9 *of Nova Scotia* case. There, a grand jury subpoena was
10 served on a domestic bank for records located in the
11 Cayman Islands. Just like here the bank resisted,
12 suggested that maybe you should try a letter rogatory,
13 and asked for permission from a local court in the
14 Cayman Islands to disclose the records, which was
15 refused.

16 The court -- the Eleventh Circuit rejected the
17 letter rogatory alternative, just as we did because we
18 thought that we had a better way. And the court
19 rejected the dilemma, and said the bank would simply
20 have to choose between two sovereigns, and choose where
21 it decides to do business.

22 Now, there are numerous cases that have
23 followed that principle, the *Bank of Nova Scotia*
24 principle, and it's cited in their briefs -- or in our
25 briefs.

1 Against all this case law, the bank cites to
2 the *In Re Sealed Case* in the D.C. Circuit where a court
3 refused to enforce a grand jury subpoena that was served
4 on a bank that was owned by a foreign country for
5 records of a branch located in a second foreign country.
6 The case is unusual in the fact that it doesn't tell us
7 what countries they are, Country X and Country Y.

8 But that case is distinguishable in several
9 ways from the situation we have here. First, the bank
10 in that case was owned by the foreign country, which I
11 think makes the conflict or the dilemma appear more
12 stark. And the government conceded in that case that it
13 would be a crime in the foreign country, and we don't.
14 We believe that the Saudi government can authorize this
15 very quickly if they just complied with the
16 international obligations that they have agreed to in
17 the U.N. convention.

18 But, most importantly, Your Honor, the three-
19 judge panel in the *In re Sealed Case* conceded that
20 Congress could empower a court to issue contempt orders
21 in these cases, and it would be the court's duty to
22 enforce them.

23 And that's exactly what Congress did in this
24 case. This statute is designed to go straight to this
25 dilemma because the fact that your corresponding bank

1 privileges may be cut off is to prevent the kind of
2 resistance that we see in just this case.

3 The last case I want to mention, other cases
4 that have dealt with the issue of the conflict between a
5 foreign bank secrecy law and the obligations in the
6 United States sometimes reference the restatement that
7 is quoted in the Ninth Circuit's *Richmark* case, and I
8 think that one is illustrative, too.

9 That case actually came out of this district,
10 it came from Judge Frye, where she enforced a discovery
11 order against a Chinese company that was owned by the
12 People's Republic of China seeking net worth information
13 in support of a civil judgment. And there were claims
14 that providing that kind of information would violate
15 the law of the People's Republic of China. And the
16 court looked at, you know, five different issues. And I
17 think they all favor enforcement of the subpoena here.

18 One is the importance of the document sought.
19 And I won't belabor the point, but we obviously need, as
20 much as possible, to be able to trace the disposition of
21 the funds that came from Oregon in this case.

22 The burden of complying with the request, and
23 the bank doesn't even suggest that complying with a
24 subpoena to provide three months' records is any kind of
25 an economic practical burden.

1 Where the information is located, now the
2 information obviously is located in the Kingdom of Saudi
3 Arabia, but I point out that the reason that we're here
4 is because the owner of the account in Saudi Arabia came
5 to Oregon, collected \$150,000, and took it back and
6 transacted these dollar transactions at the Al Rajhi
7 Bank, which is why we have issued the subpoena we have.

8 Whether there are alternatives, we've tried
9 them, and they just haven't worked.

10 But most importantly is what are the national
11 interests involved? And here again, the prevention of
12 terrorism financing is clearly in the United States'
13 national interests. And I'd suggest it's in the
14 interests of the Kingdom of Saudi Arabia also. They
15 wouldn't have signed the convention if it weren't. And,
16 in fact, Your Honor, they have actually shut down the
17 al-Haramain Foundation because of terrorism financing.
18 So I think our interests coincide in most ways.

19 Your Honor, I think the second issue the bank
20 raises is whether or not there is a constitutional
21 problem with the way Congress set up the enforcement of
22 the statute. We've briefed that. I don't want to
23 belabor the point. We are here asking the court to rule
24 on the propriety of the subpoena and enforce it. And
25 the statute sets up a way for a bank to get court

1 review, a motion to quash, which the bank did. It's
2 here now. And it seems to me that that is all the
3 Fourth Amendment requires of any administrative
4 subpoena, let alone one served on a foreign bank for
5 foreign bank records where there may be much less in the
6 way of Fourth Amendment protections.

7 The kind of view the court is supposed to make
8 at that point is very limited. Did Congress grant
9 authority to investigate? Have the procedural
10 requirements been met? And whether the evidence is
11 relevant material to the investigation. I don't think
12 the bank seriously challenges the first two categories.
13 They make a halfhearted attempt to challenge the third
14 that says despite the statute's plain wording, it can't
15 be used to obtain evidence post-indictment.

16 I would note first that there is no time
17 limitation or proceeding limitation in 5318(k), in the
18 statute.

19 Second, not only -- the statute gives not only
20 the Attorney General the power to issue this kind of
21 subpoena but also the Secretary of the Treasury. And I
22 question -- I mean, the Secretary of the Treasury is not
23 in charge of indicting anyone. So I question whether
24 there is any kind of limitation about indictment --
25 post-indictment even in the gloss of the statute.

1 But, finally, the Department of Justice doesn't
2 stop investigating once a case is indicted. We can't
3 use grand jury subpoenas because the grand jury can't
4 act any further once a case is finally indicted. But we
5 do continue to investigate. We do witness interviews.
6 We will issue Rule 17(c) subpoenas or -- to gather
7 evidence. And Congress was presumably aware that we
8 have constantly used DEA administrative subpoenas and
9 health care fraud administrative subpoenas post-
10 indictment to collect evidence. Now, there are several
11 cases that have upheld our use of that.

12 Most importantly, the case of *U.S. versus*
13 *Phibbs*, a Sixth Circuit case from 1993 that upheld
14 exactly that. The bank suggests that that was dicta in
15 that case, but I don't think that's right. There, the
16 defendant challenged both the basis for the subpoena,
17 the lack of probable cause, and that's what the court
18 said there was no standing to address in the particular
19 case, but it went on to rule that the fact that the
20 subpoena was used post-indictment was not a problem.

21 And it's worth noting that the DEA
22 administrative subpoena and the health care fraud
23 administrative subpoena that are referred to in our
24 briefs both refer to the department issuing these in the
25 course of an investigation, and they've been upheld

1 post-indictment.

2 Now, opposed to all this, the bank cites the
3 *Resolution Trust Company* case versus *Grant Thornton*,
4 again in the D.C. Circuit. Totally different statute, a
5 different agency, and a different purpose for the
6 administrative subpoena. That was an extremely broad
7 mandate that the RTC had, which was to issue
8 administrative subpoenas, quote, for the purpose of
9 carrying out any power, authority, or duty, and was not
10 as narrowly drawn as this particular administrative
11 subpoena statute is. And it was issued solely to
12 discover the financial net worth of a party after a suit
13 was filed.

14 Now, the case is distinguishable not just
15 because of its -- the fact that it's a different statute
16 and a different agency, the D.C. Circuit read into it a
17 statute of limitations, so to speak, analogizing it to a
18 grand jury subpoena.

19 My view -- and I guess it's only my view -- but
20 with all due respect to the D.C. Circuit, I don't think
21 the grand jury analogy was apt because, again, after
22 indictment, a grand jury can't do anything. The RTC
23 could still pursue its lawsuit. But the other thing
24 that they suggested was it was a way to get around
25 limits on discovery regarding net worth before judgment.

1 So here Congress has specifically given us this
2 method, and we can't use a trial subpoena, Your Honor.
3 We can't use a Rule 17(c) subpoena in this case to
4 obtain these records. So we're not getting around
5 anything.

6 Finally, Your Honor, the bank challenges the
7 scope of the subpoena. This is a very traditional way
8 to -- we're getting some simple bank records, and I
9 frankly don't think that there is anything wrong with
10 that.

11 Unless the court has any questions, we would
12 ask you to issue an order finding that the subpoena was
13 duly authorized and issued under the statute. It's
14 relevant to the issues in this case. Denying the bank's
15 motion to quash. And ordering the bank to comply within
16 10 days.

17 THE COURT: All right. Let me ask just a
18 clarifying question, I want to make sure specifically
19 what you are asking me to do. Do you draw any
20 distinction between the government seeking to impose a
21 5318(k) sanction and actual compliance with the subpoena
22 to produce the documents, in other words?

23 MR. GORDER: Correct.

24 THE COURT: All right. You are seeking both of
25 those things or just the first?

1 MR. GORDER: No, we are just seeking your order
2 that the bank has to comply, and denying their motion to
3 quash. I mean, ultimately it will be up to the Attorney
4 General and the Secretary of the Treasury whether to cut
5 off the corresponding bank privileges.

6 THE COURT: Thank you. All right. Is it
7 Mr. Green?

8 MR. GREEN: Yes, it is, Your Honor.

9 THE COURT: How did you get the Internet
10 address "bigreen"?

11 MR. GREEN: I have my parents to thank for
12 that.

13 THE COURT: Okay.

14 MR. GREEN: The initial matter I want to
15 address is the fact that the bank is not a party to this
16 case. There is not -- there are no allegations of
17 wrongdoing by the bank. The case has been pending for
18 almost five years. And the records requested are almost
19 ten years old. The bank doesn't wish to delay the
20 trial. And it's not trying to deprive the government of
21 the records. It's trying to avoid violating Saudi law
22 in Saudi Arabia and subjecting itself there to criminal
23 prosecution, including imprisonment and fines.

24 The bank is the third largest bank in Saudi
25 Arabia. It has one of the largest net worths of

1 domestic branches there. It's publicly traded. It is
2 followed by analysts at the Standards & Poor (sic).

3 For the bank to be prosecuted in its home
4 country of violating explicit instructions by its
5 regulator not to comply with the request as stated would
6 be a tremendous impact -- would have a tremendous impact
7 on the bank's business and on its reputation. In the
8 same way, the dilemma of having to lose its
9 correspondent accounts in the United States due to
10 government action would foreclose many lines of
11 businesses that depend on those correspondent accounts
12 and services the bank will no longer be able to provide
13 its customers. And would also cause tremendous
14 reputational harm to the bank. And that could have
15 spillover that we've seen with actions under 5318A,
16 which the government has threatened using against the
17 bank, could also lead to closure of correspondent
18 accounts in other countries as well.

19 The bank has tried very hard since receiving
20 the subpoena to find a way to comply with the subpoena.
21 It immediately requested authorization by its regulator
22 as required under Section 2.63 that the government has
23 quoted here. It requires preapproval and cooperation of
24 SAMA. And SAMA, Saudi Arabian Monetary Authority,
25 refused to provide the bank with the authorization to

1 provide the records, and stated very explicitly in its
2 letter to the bank that the bank would be subject to
3 criminal prosecution if it did so.

4 The declaration by the head of the bank's legal
5 department that we submitted here states that this is
6 not an empty threat, and the bank is seriously concerned
7 about those possibilities.

8 So in that sense, the dilemma is a clear
9 dilemma. While the government has used the treaty for
10 suppression of terrorism financing, that's not a treaty
11 that is necessarily relevant in this case. We don't
12 know what the Saudi government's handling of that treaty
13 has been. The bank is privately owned. And it's not
14 connected in any way to the Saudi government. But the
15 reading -- the plain reading of that treaty and the
16 government looked at the allegations and accounts in
17 this indictment, they don't clearly involve financing
18 terrorism. And, therefore, Saudi Arabia could
19 reasonably have determined that this was not the
20 appropriate mechanism to request these documents.

21 The bank has suggested many other options to
22 try to work with the Saudi regulator to obtain
23 permission to provide the records. It asked the
24 government for additional details regarding the previous
25 requests. And those requests by us to the government

1 were declined.

2 The bank also suggested that if the government
3 has copies of these records or some of the records which
4 may not be admissible at trial, the bank offered to see
5 whether it could certify those records rather than
6 provide its own records as a way to avoid being the one
7 providing the information. That was another suggestion
8 that the bank provided that the government didn't take
9 us up on.

10 What the government has not done is issue a
11 letter rogatory in this case. And the government has
12 known for almost four months that that is the process
13 that the bank's regulators have decided is the
14 appropriate mechanism. The bank has offered to try to
15 get such a letter rogatory expedited so that it can get
16 the approval to provide the documents, but the
17 government has refused to do so. And possibly this is a
18 strategic decision by the Office of International
19 Affairs regarding how to deal with the coverage of the
20 treaty, but it leaves the bank hostage to the U.S.
21 authorities being very stubborn on this specific issue.

22 While the government brings the issue of the
23 bank agreeing to be subject to this possible conflict
24 between Saudi Arabian law and U.S. law, the balancing
25 act required under restatement only comes into play if

1 the subpoena is enforceable, and we argue that the
2 subpoena is not enforceable.

3 To begin with, we have the issue of the Fourth
4 Amendment and a subpoena which is essentially self-
5 enforcing. The fact that we are here today doesn't
6 negate the Fourth Amendment issue. This is the classic
7 instance of a situation that is -- can be -- can evade
8 review but is subject to repetition because the only
9 option for a bank receiving a subpoena is to go ahead
10 and seek judicial review. There is no way for the bank
11 to sit back and wait for the government to enforce the
12 subpoena, because that's not required under the statute,
13 which sets it apart from every other administrative
14 subpoena statute.

15 Additionally, under *Sherar v. Cullen*, the bank
16 should have that right to wait for the government to go
17 ahead and seek enforcement of the subpoena. And it
18 having to go ahead and seek judicial protection doesn't
19 solve the constitutional issue here.

20 The government has tried to compare the search
21 here to the search in *United States versus*
22 *Verdugo-Urquidez*. Those are very different situations.
23 The search here is not entirely in Saudi Arabia. It was
24 issued based on the bank's connections to the United
25 States, the enforcement power is here in the United

1 States, and it requires the bank to bring the documents
2 to Medford, Oregon, which is -- I would say -- pretty
3 much quintessential American.

4 THE COURT: Yeah, they have electricity there
5 now.

6 MR. GREEN: So we hear back in D.C. We barely
7 have any there right now.

8 The government has also said the fact that the
9 defendant in *Verdugo-Urquidez* was in the United States,
10 Justice Rehnquist made it very clear that that wasn't an
11 issue there because he had been brought to the United
12 States against his will, and, therefore, hadn't
13 affirmatively brought himself to the United States and
14 sought the protection. That's very different from a
15 bank that has been keeping correspondent accounts in the
16 United States for at least ten years, if not longer.

17 Even if the statute is constitutional, this is
18 clearly a misuse of administrative subpoena power. It
19 is black letter law that grand jury subpoenas may not be
20 used to gather evidence for trial. And there are many
21 cases that compare grand jury subpoenas to
22 administrative subpoenas starting with *U.S. v. Morton*
23 *Salt* which makes that comparison, and is one of the
24 seminal cases regarding enforcement of administrative
25 subpoenas.

1 And since the government has argued Congress
2 has deemed to be aware of the law regarding use of
3 administrative subpoena, Congress would also have been
4 aware of *RTC v. Grant Thornton* which makes it very clear
5 that administrative subpoenas cannot be used to gather
6 evidence for trial, and that doing so would upend
7 traditional notions of investigations.

8 The cases that the government has cited to
9 support its conclusions are not D.C. Circuit cases and
10 are not Ninth Circuit cases. *U.S. v. Phibbs* is actually
11 a case that *RTC v. Grant Thornton* cited to support its
12 conclusion there. I would submit that that means that
13 the holding in *U.S. v. Phibbs* is open to interpretation.

14 *U.S. v. Harrington* doesn't include a lot of
15 discussion, but it also doesn't cite ongoing
16 investigations.

17 And *U.S. v. Lazar*, which is the unpublished
18 case from '09 that the government cited setting out the
19 rule in the Sixth Circuit, also makes clear that that
20 rule is a departure from traditional notions of use of
21 administrative subpoenas.

22 Therefore, if Congress really wanted to provide
23 the Department of Justice and the Department of Treasury
24 to use these subpoenas in a way that is in opposition to
25 the established rules regarding administrative

1 subpoenas, it would have been explicit in that.
2 Administrative agencies are creatures of statute. They
3 have the powers that are granted to them by statute.
4 And this statute does not explicitly grant the power to
5 use these subpoenas to gather evidence for trial. They
6 are purely investigative.

7 The government does not dispute that the
8 records are sought to gather evidence for trial. And at
9 this stage in the proceeding, it would be difficult to
10 believe that there is any ongoing investigation of any
11 additional wrongdoing. And the government may actually
12 use grand jury subpoenas in cases where there are
13 continuing investigations into ongoing or other
14 violations of the law that are not already in the
15 indictment.

16 Additionally, in terms of the scope of the
17 subpoena, the subpoena requests documents that all
18 relate to an individual's private account at the bank.
19 The statute -- the clear language of the statute speaks
20 to relating to the correspondent account, and to
21 request the universe of documents requested in this
22 subpoena reads the words "relating to" out of the
23 statute, and that's clearly an improper way to read the
24 statute.

25 If the statute is constitutional and this is a

1 proper use for an administrative subpoena and if this is
2 a subpoena that asks for the kinds of documents that are
3 requested, that are allowed under the statute, the
4 government -- the court still has to conduct a balancing
5 test under the restatement of foreign relations. And we
6 submit that in this case, the balance of the interests
7 lies with quashing the subpoena rather than enforcing
8 it.

9 The need for the documents is questionable
10 given the fact that the government, as stated in Special
11 Agent Anderson's declaration, already knows that the
12 funds made their way to Saudi Arabia, were deposited at
13 the bank, and that the bank had then worked with its
14 correspondent accounts to negotiate these instruments.

15 The hardship on the bank if it complied with
16 the subpoena is clear. It would be subject to criminal
17 prosecution. And that is clearly a significant hardship
18 under all the cases reading this -- the restatement
19 balancing test. And in terms of the balance of
20 interests, the government does speak broadly about its
21 ability to conduct investigations into money laundering
22 and financing of terrorism, but in this case it's about
23 seeking some additional evidence to prove a point that
24 we submit could already be proven with records that the
25 government already has or records they can easily get

1 from the U.S. banks.

2 The Saudi interest here is making sure that the
3 banks that it regulates don't work with international
4 powers without going through the bank's own regulators.
5 It would be very difficult for Saudi authorities to
6 regulate their own banks if these banks are subject to
7 demands from foreign authorities without involvement of
8 the local authorities.

9 Saudi Arabia has not refused these documents.
10 There are other options for the government to obtain the
11 documents. We pointed out that a letter rogatory is
12 what the Saudis already themselves had asked for as
13 opposed to cases the government cites where the
14 recipient of the subpoena suggested without showing that
15 that was a method that would have worked. And it's
16 unclear that enforcing the subpoena, if it led to
17 closure of the bank's correspondent accounts, would --
18 that, in fact, would foreclose the ability of the
19 government to obtain these documents. And that is one
20 of the balancing issues that are brought up in *Richmark*.
21 And we believe here would militate to quash the subpoena
22 rather than enforce it.

23 THE COURT: Thank you. Mr. Gorder.

24 MR. GORDER: Your Honor, just briefly. I think
25 the issue is joined before you.

1 Just a couple of points I want to make. I
2 can't accept that the Kingdom of Saudi Arabia would say
3 that this is not a terrorism case when they shut down
4 al-Haramain because of its terrorist connections. It's
5 clearly what the case is about.

6 Second, I just don't read the *Sherar versus*
7 *Cullen* case that counsel cites to stand for the
8 proposition that providing the bank the option to file a
9 motion to quash somehow doesn't make this statute
10 constitutional. I just don't read that in that case.

11 So we would request that you enforce the
12 subpoena.

13 Your Honor, as you know, this is a case of
14 first impression, I don't want to delay your decision,
15 but I do believe this is one that, you know, lawyers
16 throughout the country will want to read your reasoning.

17 MR. WAX: Your Honor?

18 THE COURT: You have an interest here, too,
19 Mr. Wax.

20 MR. WAX: We do.

21 THE COURT: Okay. Go ahead.

22 MR. WAX: Thank you. We urge the court to view
23 this request by the government in the context of our
24 requests. It's an unusual situation which both the
25 defense and the government are seeking records from

1 overseas. And we urge you in looking at our Saudi
2 request, reconsidering our Egyptian request to do so in
3 the context of the government's request.

4 The second comment I would make is that the use
5 by the government and its citation to the International
6 Convention for the Suppression of the Financing of
7 Terrorism reinforces the point that we've attempted to
8 make about the power that the government has, and the
9 fact that it should not be permitted to use its powers,
10 although in this instance not so far successfully,
11 without balancing the playing field.

12 Third point, with respect to terrorism, in the
13 year 2000, when the money that the government alleges
14 went to Chechnya, the fight in Chechnya was not one
15 viewed by the world or by the United States of America
16 specifically as a terrorist action. It was rather a war
17 of liberation or resistance to Russian aggression. And
18 we've previously mentioned that the current vice
19 president --

20 THE COURT: When were the school children
21 assassinated?

22 MR. WAX: I don't recall the answer to that
23 question, Your Honor, but there is absolutely no
24 suggestion that we have seen in this case that the
25 government has any notion that the money which we assert

1 was used to buy, if you will, blankets and food for
2 widows and orphans was used for any specific terrorism
3 offense. And the reality of the world's view of what
4 was happening in Chechnya in 2000 takes us outside of
5 any funding of terrorism.

6 The country that wanted to be the country of
7 Chechnya, or perhaps was, was engaged in a war with the
8 Soviet Union that was the Second Chechen War. Joe
9 Biden, Vice President, then Senate Foreign Relations
10 Committee; Madeleine Albright, former Secretary of
11 State, and other United States officials have described
12 the war in that way.

13 So I think that with respect to any terrorism
14 issue that exists between the United States and the
15 bank, this is outside of that purview.

16 The next point that I would make, to the extent
17 that you were concerned about the lateness of our
18 request for Mr. El-Fiki, what you heard from the
19 government is they proceeded in an informal way. We
20 proceeded in an informal way. They were stymied. We
21 were stymied. After they were stymied, they turned to
22 the court. After we were stymied, we turned to the
23 court. So I think that as you are considering the
24 timing of our actions, the context again, the playing
25 field should be even.

1 Next point, the government and the court, in
2 looking at the El-Fiki matter raised some questions
3 about the relevance of the El-Fiki information we were
4 seeking. I would submit that there is a significant
5 question about the relevance of the information the
6 government is seeking.

7 If what we're seeking with respect to El-Fiki
8 is not relevant, then we fail to see how this is
9 relevant.

10 To the extent that Mr. Sedaghaty had any
11 control over the funds, his intent, his purpose was to
12 do something humanitarian. If, after the money went to
13 Saudi Arabia, other people acting independently of him
14 did, as the government suggests, something different,
15 irrelevant to his state of mind and the charges in this
16 indictment.

17 So while we believe that El-Fiki is relevant,
18 based on what you've already said, it seems this is
19 equally as irrelevant or, perhaps, equally as relevant.

20 Finally, the bank suggests the government may
21 already have these records. We believe the government
22 is already in possession of the records. Whether or not
23 these United States Attorneys have them in their
24 possession may be a different question. And I think
25 that that would require the court or behoove the court

1 to inquire further into those matters. And that may
2 involve having classified sessions under the CIPA.
3 Thank you.

4 THE COURT: What about the last suggestion?

5 MR. GORDER: Excuse me, Your Honor?

6 THE COURT: What about the last suggestion?

7 MR. GORDER: Your Honor, if we had records that
8 we could --

9 THE COURT: It's just one of the first times
10 that Mr. Wax has suggested I meet with the other side
11 alone. I've known him a long time, too.

12 MR. GORDER: Your Honor, we'd be happy to meet
13 with you alone, if that's what you desire.

14 If we had records that we could use in court at
15 the trial, we wouldn't have gone through this process.
16 But I'll leave to the court the decision of whether
17 Mr. Wax is supporting the government's motion or
18 opposing it because I'm not sure which. I will just
19 say, the government tried a very formal diplomatic
20 request in the summer of 2008 that failed, so we haven't
21 been sitting around twiddling our thumbs.

22 THE COURT: I know whose side you are on.
23 That's all right.

24 MR. WAX: I would point out to you that I found
25 Mr. Gorder's phrasing very, very interesting. If we had

1 records --

2 THE COURT: I listened, Mr. Wax.

3 MR. WAX: -- that we could use in court, you
4 know, that doesn't say he doesn't have the records.

5 THE COURT: I listened. That's all right. I
6 don't have my hearing aids on, but I'd tell you to
7 repeat if I didn't hear.

8 MR. WAX: Thank you. Sorry.

9 THE COURT: Okay. You had a couple of other
10 things to raise.

11 MR. WAX: Yes, briefly, Your Honor. We have --
12 the court issued an order with respect to discovery that
13 included grand jury matters last week. Mr. Matasar and
14 Mr. Cardani engaged in some discussion about the fact
15 that we don't yet have the grand jury testimony of
16 Ms. Anderson. We believe that it is relevant to us now.
17 We believe that it may contain information that would be
18 instructive in the framing of a motion to dismiss, and
19 as well as trial preparation, and it was ordered more
20 than six months ago, and we'd request the court direct
21 the government to provide it to us forthwith.

22 You also still have pending before you two
23 motions for bills of particular. As our trial
24 preparation work is heating up and as we're looking
25 forward to the mid-March date for provision of witness

1 and exhibit lists, it becomes more and more critical for
2 us to get rulings on those motions, and hope that you
3 can get to them in the near future. That's it. Thank
4 you.

5 THE COURT: Okay. Anything else?

6 MR. CARDANI: No, Your Honor.

7 THE COURT: Thank you all very much.

8 (The proceedings were concluded at 12:45 p.m.)
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1 CERTIFICATE

2 I, Deborah Wilhelm, Certified Shorthand Reporter
3 for the State of Oregon, do hereby certify that I was
4 present at and reported in machine shorthand the oral
5 proceedings had in the above-entitled matter. I hereby
6 certify that the foregoing is a true and correct
7 transcript, to the best of my skill and ability, dated
8 this 17th day of February, 2010.

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12
13 /s/ Deborah Wilhelm
14 Deborah Wilhelm, RPR
15 Certified Shorthand Reporter
16 Certificate No. 00-0363
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